(1)

91-1941

Supreme Court, U.S.
FILED
MAY 27 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LEGRAND L. MALANY,

Petitioner,

vs.

THOMAS J. MORAN, Individually and as former Chief Justice of the Supreme Court of Illinois, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

Did the court of appeals deny due process and abridge free speech by imposing cumulative sanctions against an attorney-party and his attorney of record who invoked federal jurisdiction to protest actions of the Illinois Supreme Court, including:

a. suspension of the attorney-party's license to practice law indefinitely without a hearing, and

b. criminal contempt proceedings instituted against the attorney-party based on unauthorized practice of law without first providing a hearing on the prior suspension of his license?

PARTIES TO THE PROCEEDINGS BELOW

LeGrand L. Malany (Malany), the Petitioner in this action, was the attorney of record for Alfred H. Greening, Jr., (Greening), in the matter of Alfred H. Greening, Jr. v. Thomas J. Moran, Individually and as former Chief Justice of the Supreme Court of Illinois, *et al*, which was the proceeding below and to which this Petition relates. Alfred H. Greening, Jr., concurrent with the filing of this Petition, has filed a separate petition regarding the proceeding below. Alfred H. Greening, Jr., was the Plaintiff-Appellant in the proceedings below. The respondents in this action are: nominally the United States Court of Appeals for the Seventh Circuit; and, the Defendant-Appellee's below who are Hon. Thomas J. Moran, individually and as Chief Justice of the Supreme Court of Illinois (since having been replaced by Benjamin K. Miller as Chief Justice by change in office); James Bandy, Mary Robinson, Lester Asher, David Hartigan, Frederick T. King, Suzanne Barancik and John P. Clarke, individually, and as Chairman and members of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC); the Lawyers Trust Fund of Illinois, an Illinois not for Profit Corporation; and David C. Hilliard, Peter H. Lousberg, Frederick P. Velde, Michael A. Pope, David A. Decker, Randall A. Mead, Philip J. Rock, John J. Vassen and Jane Shaw Whitman, individually, and as the Board of Directors of Lawyers Trust Fund of Illinois.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LEGRAND L. MALANY,

Petitioner,

vs.

THOMAS J. MORAN, Individually and as former Chief Justice of the Supreme Court of Illinois, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinion and order sought to be reviewed is the opinion of the United States Court of Appeals for the Seventh Circuit, in cases 90-3784 and 91-3379, consolidated, decided January 8, 1992, before Easterbrook, Ripple, and Kanne, Circuit Judges. The opinion was final. (App. A)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1992. (App. B). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves an interpretation and application of the First Amendment guarantee of free speech and incidentally the Fourteenth Amendment guarantee against state action which deprives a person of life, liberty or property without due process of law.

ADOPTION OF PETITION OF ALFRED H. GREENING, JR.

Petitioner adopts in its entirety the contemporaneous petition for Certiorari filed by his client, Alfred H. Greening, *pro se* and titled Alfred H. Greening, Jr. v. Thomas J. Moran, Individually and as former Chief Justice of the Supreme Court of Illinois, *et al.* In addition the Petitioner herein submits the following supplementing argument on his own behalf.

SUPPLEMENTING ARGUMENT

The opinion of the United States Court of Appeals for the Seventh Circuit concludes that an appeal from Rule 11 sanctions entered by a trial court is also sanctionable by the Court of Appeals under rule 11, on its own motion, without notice.

The establishment of this procedure:

(a) "chills" a citizen's vigilance to challenge the conduct of his government;

(b) "chills" an attorney's vigorous and aggressive defense of a client's rights as required under an adversarial legal system;

(c) restricts both effective representation and access to redress of those who espouse unpopular political positions or judicially sensitive issues.

Most litigants are not attorneys and are therefore not equipped to proceed *pro se* and raise sensitive issues before a hostile forum. In this case the client was the victim of summary and cumulative sanctions by both the state and federal courts and was denied a forum to resolve an issue of significant dimension under his State's Constitution.

At the point in time that Malany (Petitioner) undertook Greening's representation in the federal court, Greening, already had his right to practice his profession denied without a hearing on the state constitutional issue Greening sought to adjudicate. There was no hearing on the suspension of his license. There was only the specter of criminal contempt proceedings. These proceedings, by order of the Illinois Supreme Court, were designed to exclude the constitutional issue sought to be adjudicated and

the validity of his suspension. It was in this context that sanctuary was sought in the due process protections of the United States Constitution.

Judge Easterbrook's opinion calls Greening a "fee protester", as if those who challenge the authority of the sovereign are inherently suspect and deserving of summary sanctions and penalties. Judge Easterbrook goes on to note that the Auditor General, a constitutional officer in the legislative branch of State Government has been involved in other legal disputes with the Illinois Supreme Court. This mind set highlights the constitutional dimensions of the underlying state issue and exposes Judge Easterbrook's desire to substitute fiction in place of the fact to attain the desired result.

Contrary to the loose language of this opinion, the state Constitutional issue raised by Greening regarding the Illinois Supreme Court's authority to raise revenue *has never been decided by any court.* To use judicial sanctions to prevent this issue from being resolved is not due process, it is judicial tyranny that should be condemned rather than compounded by the Federal courts.

CONCLUSION

For the reasons stated the writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit decided January 8, 1992 in cases 90-3784 and 91-3379, consolidated, should be issued.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-3784 and 91-3379

ALFRED H. GREENING, JR.,

Plaintiff-Appellant,

v.

THOMAS J. MORAN, Individually and as former Chief Justice of the Supreme Court of Illinois, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 90 C 3071—**Richard Mills**, *Judge.*

ARGUED OCTOBER 30, 1991*—DECIDED JANUARY 8, 1992

Before EASTERBROOK, RIPPLE, and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Some people are tax protesters. Alfred Greening is a fee protester. Greening, admitted to the bar of Illinois in 1949, refuses to pay the annual fee to the Attorney Registration and Disciplinary Commission and was removed from the ARDC's roll of authorized practitioners on March 1, 1989. Greening believes that he owes nothing because the fee was levied

* Appeal No. 91-3379 was submitted for decision without argument.

by the Supreme Court of Illinois rather than the state legislature, and that at all events fees should be collected by the court rather than the commission. Between 1978 and 1988 Greening sent checks for his annual fees made out to the Supreme Court, which endorsed them to the ARDC. In fall 1988 Greening did not complete his annual registration form or pay the annual fee for 1989. That ensured his removal from the rolls; under Ill. S. Ct. Rule 756 any member of the bar who neglects to pay the annual fee is suspended automatically until the sum (plus penalties) has been made good. In September 1989 Greening sent a cashier's check payable to the Clerk of the Supreme Court, which returned the instrument. (Greening placed this money, and the next year's payment, in escrow for the benefit of the court's Chief Justice.) Greening continued practicing law and has been convicted of contempt of court.

Greening says that he wants to vindicate the principle that governmental assessments must be authorized by the legislature and paid to governmental bodies. This is a proposition of state law—and the Supreme Court of Illinois has held that Greening misunderstands state law. Greening refuses to say die and filed this suit under 42 U.S.C. §1983. Victory would serve interests other than his own. If the Supreme Court must collect the dues, then Robert Cronson, the Auditor General of Illinois, may audit its receipts and disbursements, the gleam of his eye for years. See *Cronson v. Clark*, 810 F.2d 662 (7th Cir. 1987). Greening represented Cronson in that case, which we characterized as frivolous—so feeble that it did not even invoke the jurisdiction of the federal courts. All Greening has been able to achieve on his own behalf is to dig a deeper hole. The district court dismissed the complaint and awarded sanctions to some of the defendants under Fed. R. Civ. P. 11.

Greening filed suit against almost everyone having to do with the regulation of the bar in Illinois. His complaint names Justice Moran (Chief Justice of the Supreme Court

of Illinois at the time of filing), all of the members of the ARDC, and the Lawyers Trust Fund of Illinois (and members of its board of directors)—all in both individual and official capacities. He seeks substantial damages. The district court dismissed the complaint. 739 F. Supp. 1244 (C.D. Ill. 1990). The claims against the Trust Fund and its trustees failed for want of standing, and those against the Chief Justice and the members of the ARDC failed on twin grounds: absence of a claim on which relief may be granted, and abstention under *Younger v. Harris*, 401 U.S. 37 (1971).

The ARDC took Greening off its roll on March 1, 1989. A few months later the Administrator of the ARDC reported to the Supreme Court that Greening continued to hold himself out as a lawyer and asked the court not only to suspend him from its roll of attorneys but also to hold him in contempt of court. (The Supreme Court and the ARDC maintain separate lists of attorneys; the ARDC asked the Supreme Court to suspend Greening from its roll for the misconduct of practicing law while in default of dues.) Justice Ryan directed Greening to show cause why he should not be suspended. While the rule remained outstanding (Greening's response being a motion to vacate coupled with the checks made out to the Chief Justice and Clerk of the Supreme Court), and after the ARDC filed a supplemental report relating that Greening had appeared as counsel in an identified case, Greening filed this action under §1983.

Shortly after Greening commenced the suit, the Supreme Court of Illinois issued a rule ordering Greening to show cause why he should not be held in contempt in light of his appearance on behalf of a client. It appointed Judge J. David Bone as its special master. Greening responded by asking the district court to issue a preliminary injunction against the proceeding. The district court denied this motion and dismissed the case outright, leading to this appeal. Meanwhile the proceedings continued in Illinois. Judge Bone held a hearing and filed a report relating the facts of Greening's practice of law; the report

referred all legal issues to the Supreme Court. Greening and the ARDC filed briefs. In May 1991 the Supreme Court found Greening in contempt. After a separate oral hearing the court fined him $200. The final order of June 25, 1991, states in part:

> [Greening's] argument that removing his name from the Master Roll of Attorneys pursuant to the provisions of Supreme Court Rule 756 constitutes a violation of his due process rights because he is in compliance with "AN ACT to revise the law in relation to attorneys and counselors" (Ill. Rev. Stat. 1989, ch. 13, par. 1 *et seq.*) and because the procedures prescribed by the Act were not followed here is an argument without merit. It is well established that it is exclusively within the prerogative of the Supreme Court to determine who shall be admitted to practice law in Illinois. While the General Assembly may adopt acts which relate to the practice of law "[s]uch statutes are merely in aid of, and do not supersede or detract from, the power of the judicial department to control the practice of law." *People ex rel. Chicago Bar Association v. Goodman* (1937), 366 Ill. 346, 349.
>
> The Court also has considered [Greening's] other constitutional challenges made throughout the course of these proceedings, and we find them to be without merit.

The Supreme Court of the United States has denied Greening's petition for a writ of certiorari to review this decision. 60 U.S.L.W. 3359 (Nov. 12, 1991).

Greening insists that both the removal of his name from the ARDC's roll in 1989 and the contempt proceedings are unauthorized by Illinois law and violate the due process clause of the fourteenth amendment. He contends that the Supreme Court of Illinois could not afford him a fair hearing because it is interested in the outcome of a challenge to its own authority, that the lack of formal rules for the conduct of contempt proceedings makes the entire process unconstitutional, and that at all events the

Supreme Court's unwillingness to use the procedures provided by state statute violates the Constitution. Arguments of the last kind we have called frivolous as a matter of law, see *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081 (7th Cir. 1987), because the Supreme Court has held that the federal Constitution does not require states to follow their own procedural rules. The district court rejected this and all of Greening's other arguments on the merits, 739 F. Supp. at 1250-55, then added, *id.* at 1256, that the suit would fail in any event under *Younger* and *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). See also *Pincham v. Illinois Judicial Inquiry Board*, 872 F.2d 1341 (7th Cir. 1989).

Although we appreciate the judge's desire to demonstrate to other persons that claims of the sort Greening presses are doomed, it is not appropriate to address the merits in a case to which *Younger* applies. *Younger* does not pave a one-way street in which defendants may prevail on the merits but cannot lose. *Younger* abstention is appropriate only when resolution of the federal defenses belongs in the state forum. To say that abstention is in order then is to say that federal courts should not address the merits, period. *Silence* by the federal court is the objective of abstention; the desirability of silence is the reason for abstention. When there is an ongoing state proceeding, whether to abstain is the *first* question, and an affirmative answer brings the case to an end.

Abstention was appropriate in June 1990, when the district judge resolved the case. In August 1989, seven months before Greening commenced this suit, the Supreme Court of Illinois ordered him to show cause why he should not be suspended from practice. Such a proceeding, before the Supreme Court itself, is judicial in nature. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477-79 (1983); *In re Summers*, 325 U.S. 561 (1945). Only seven days after Greening filed his complaint, the Supreme Court of Illinois directed him to show cause why

he should not be held in contempt of court. The contempt proceeding was criminal litigation, with the ARDC as prosecutor—and Greening acknowledged its judicial nature by asking the Supreme Court of the United States to review the ensuing fine. He wanted the district court to enjoin the contempt proceeding. *Younger* applies with full force to a request for an injunction against a criminal prosecution in which the state tribunal stands ready to entertain federal defenses. That the putative state defendant managed to get the federal suit under way first is inconsequential. *Hicks v. Miranda*, 422 U.S. 332, 348-50 (1975).

Now that the state proceeding has reached its end, abstention is no longer appropriate. The Supreme Court of Illinois rejected Greening's constitutional arguments on the merits—and if he withheld from the state tribunal some of the points he makes here, Greening has only himself to blame. We apply the same rules of preclusion Illinois uses. 28 U.S.C. §1738; *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984). In Illinois, a final decision is preclusive not only on claims and defenses actually presented but also those that could have been presented. E.g., *Frier v. Vandalia*, 770 F.2d 699 (7th Cir. 1985), and *Button v. Harden*, 814 F.2d 382 (7th Cir. 1987), both collecting Illinois cases. Greening could not undertake fresh litigation in Illinois seeking a declaration that he is entitled to practice law without paying the annual fee, or damages from members of the ARDC. So Greening loses outright—but on claim preclusion (res judicata), rather than on an independent federal consideration of the merits.

So far, our discussion has dealt only with Greening's claims against the ARDC and Justice Moran. None of the proceedings in state court concerned the Trust Fund. The district judge rightly dismissed Greening's claims against the Trust Fund and its directors for want of a case or controversy. Rule 1.15(d) of the Rules of Professional Conduct issued by the Supreme Court of Illinois requires lawyers to deposit funds held for their clients in interest-

bearing trust accounts. The interest from these accounts is to be turned over to the Trust Fund, which uses the money to assist indigent litigants. Greening lacks a justiciable dispute with the Trust Fund, the district court held, because he has not alleged that he possesses any client funds covered by Rule 1.15(d). 739 F. Supp. at 1254-55. "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The court thought that Greening failed at every step. After it dismissed the complaint Greening filed an affidavit stating that "he has maintained an account during his practice of 40 years that could qualify as an account subject to" Rule 1.15(d). The district court thought this insufficient, writing that it is "untimely, ambiguous, and contradicted by Greening's previously stated position." Nothing in the complaint or affidavit, the district court held, establishes a concrete controversy. This shortcoming is so apparent, it thought, that sanctions under Rule 11 are in order. The court ordered Greening to pay $8,737.74 to offset part of the expenses the Trust Fund and its members incurred in defending against his claims.

Complaint, affidavit, and appellate briefs together fall short of establishing a case or controversy between Greening and the Trust Fund. The Fund has never claimed entitlement to interest from any client funds Greening holds—if indeed Greening holds any. His affidavit does not say that Greening possesses one penny of client trust funds or anticipates receiving any in the future. Greening's affidavit contains no *facts*; he offers only a bare conclusion that an "account" of unknown attributes "could" be within the rule. Although failure to comply with Rule 1.15(d), or any other of the state's ethical rules, may lead to discipline, no proceeding charging noncompliance with Rule 1.15(d) is under way or in the offing. One of Greening's appellate briefs shows his thinking: "Greening challenged all revenue raising by court rule not authorized by the State Constitution or legislative enactment. Therefore, the subject

matter of his challenge necessarily included the Lawyer's Trust Fund." In addition to revealing that his objection to the Trust Fund is grounded in state law, this says that Greening sued the Fund not because of a concrete controversy but because he sought to cover the waterfront. A litigant's desire to vindicate a position does not establish standing. *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990); *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

Even if we take the affidavit for all it could be worth, and acknowledge Greening's concern that state officials may try to retaliate against him for suing Justice Moran and the ARDC, still Greening has no dispute *with the Trust Fund.* The Fund is a depository. Its board does not initiate or decide disciplinary matters. Initiation and prosecution are functions of the ARDC, decision a function of the judiciary. If Rule 1.15(d) is unconstitutional, relief would run against the ARDC or court. Greening is not entitled to the interest, which belongs to his clients if not to the Fund. He has never attempted to grapple with the implications of the fact that his dispute is not with the designated recipient of the interest.

Judge Mills found that by filing the complaint without investigating the problem of standing, and without alleging that he had any funds subject to Rule 1.15(d), Greening and his lawyer LeGrand L. Malany violated Rule 11. Their brief on appeal from the order awarding the sanction reargues the substance of the standing decision. They neither acknowledge the deferential standard of appellate review, see *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2457-61 (1990), and *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) (in banc), nor try to show that the district court abused its discretion. Much of their submission actually supports the district court's decision. They pin their argument for standing on an asserted fear that "the [Supreme] Court would retaliate against [Greening] for raising issues it refused to address." This has nothing to do with the Fund; Greening does not

assert that he feared that *it* would retaliate, and at all events even well-grounded fear justifies no more than an injunction. Yet his complaint did not ask for an injunction against the Fund or its directors; instead Greening demanded $775,000 in damages from the directors, who he named in their individual as well as their official capacities. Three of the nine persons Greening named as defendants (David C. Hilliard, Peter H. Lousberg, and John J. Vassen) were not directors at the time of the complaint, so damages for past wrongs is the only relief Greening seeks from them. Yet although Greening has never identified any wrong these persons committed, he has retained them as parties. Even by the standards of Greening's professed objectives, his complaint is an inexcusably slipshod document.

The directors' brief in this court puts the matter aptly: "The two attorneys [Greening and Malany] . . . have cost the needless expenditure and diversion of funds earmarked for legal services to the indigent and the defense of personal liability claims against fellow practitioners who have volunteered their time and expertise to the administration of that program." Rule 11 requires pre-filing investigation of both factual and legal aspects; the district court found that no such investigation preceded this suit. The court did not abuse its discretion in awarding sanctions. (Greening and Malany do not contest the amount.)

Sanctions under Rule 11 are not the end of the matter. The Trust Fund will not retain the full value of the sanction (and thus indigent litigants who are the Fund's beneficiaries will be worse off) if it is out of pocket the costs of defending Greening's appeals. Yet appeals need not erode the value of the award to the wronged party. Frivolous appeals are sanctionable under Fed. R. App. P. 38. The Supreme Court observed in *Cooter & Gell*, 110 S. Ct. at 2462, that "courts of appeals have ample authority to protect the beneficiaries of Rule 11 sanctions by awarding damages and single or double costs under Rule 38—which they may do, as we have noted, when the appellant had no reasonable prospect of meeting the difficult stan-

dard of abuse of discretion." Greening and Malany, who have not even *acknowledged* that appellate review is deferential, "had no reasonable prospect of meeting the difficult standard of abuse of discretion."

The frivolous appeal on sanctions is the capstone of litigation that is hollow in every particular. We told Greening in *Cronson v. Clark* that who has the power to assess and collect annual fees from the Illinois bar is a question of Illinois law. Greening is back, with a different patina but the same agenda—to "challenge[ ] all revenue raising by court rule not authorized by the State Constitution or legislative enactment." His arguments against the ARDC included one that *Szabo* held sanctionable as a matter of law, plus others that had no prospect of escaping *Younger* let alone of succeeding on the merits. These appeals have done nothing beyond heaping extra litigation expense on the defendants. Litigants ordinarily bear their own costs, but Greening has multiplied the proceedings, adding a federal overlay to the ongoing state case. Cf. *Wisconsin v. Glick*, 782 F.2d 670 (7th Cir. 1986); *In re TCI Ltd.*, 769 F.2d 441 (7th Cir. 1985). Costs attributable to that multiplication properly are borne by Greening and Malany. The outcome of these appeals was "foreordained by the lack of substance to the appellant[s'] arguments." *Mars Steel*, 880 F.2d at 938. We conclude that both appeals are frivolous and that the appellees are entitled to damages under Rule 38 and 28 U.S.C. §1927 equal to the legal fees and other expenses they have incurred in this court. Greening and Malany are jointly and severally liable for these damages. Appellees have 15 days to submit statements of the fees and costs reasonably incurred.

AFFIRMED, WITH SANCTIONS

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 27, 1992

Before
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

Nos. 90-3784 and 91-3379

Alfred H. Greening, Jr.,

Plaintiff-Appellant,

v.

Thomas J. Moran, Individually and as former Chief Justice of the Supreme Court of Illinois, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 90 C 3071—Richard Mills, Judge.

Order

Plaintiff-Appellant filed a petition for rehearing and suggestion of rehearing en banc on January 22, 1992. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED. Judge Wood did not participate in the consideration or decision of this case.

APPENDIX C

[Dated July 22, 1991]

IN THE SUPREME COURT OF ILLINOIS

M.R. 5916

In re:	)	
	)	Atty. Reg.
Alfred H. Greening, Jr.	)	& Disc. Comm.
	)	89 CH 425

REPORT OF PROCEEDINGS of the hearing before the Illinois Supreme Court on the 25th day of June, 1991.

APPEARANCES:

MR. JEROME LARKIN,
for the Fee Administrator.

MR. LeGRAND MALANY,
for the Respondent.

Jerry Wedeking, CSR, RPR
Official Court Reporter County Building
Springfield, Illinois 62701

THE COURT: The next matter is M.R. 5916, In Re. Alfred H. Greening, Jr.

MR. MALANY: If it please the court, I'm Lee Malany representing Mr. Greening.

We find ourselves here today for a sentencing in which the questions was created—the case in the first instance to (unintelligible) to be addressed.

As the record shows, Greening tried to raise with this court the very basic issue regarding the court's fee raising procedures.

Although a number of constitutional legal issues were concomitantly drawn into the controversy, the real focus became the issue of payment.

Judge Bone noted that payment was an issue in his hearings but that he could not address that issue because he was limited only to the findings of fact based on Greening's conduct after it had been removed if from the master roll.

Therefore, Judge Bone did not address the issue of payment, and this court excluded the issue of payment by limiting briefs and arguments to whether Greening engaged in the unauthorized practice of law after his name had been removed from the master roll.

This court never addressed the issue of the concomitant issue also of whether Greening should have automatically have been reinstated on the master roll after he made his payments.

These issues were bypassed completely.

On the issue of intent, remembering that this is a case of indirect criminal contempt, Judge Bone determined that he could not find on that issue.

Even though intent is a question of fact for the trier of fact, Judge Bone then determined that he could not make any finding with regard to intent because that issue had to be brought to the Supreme Court. Therefore, Judge Bone did not make any finding on intent, and this court has never addressed that issue or made that finding.

Yet the law is clear that in order to support a finding of indirect criminal contempt there must be a finding that the perpetrator was contumacious of the court or it acted with the intent to bring the court in disrepute.

That fact has never been determined. Bone made no findings as to whether Greening had engaged in the unauthorized practice of law. Bone could not make that type of finding because he had determined that his authority was limited only to facts, and the determination of the unauthorized practice of law was a combination of fact and law.

This court has made no findings regarding the unauthorized practice of law.

In its order on May 29th this court merely states that it has been established beyond a reasonable doubt that there was the unauthorized practice of law, but there is nothing to tell us who has made this establishment.

In the course of presenting the fee raising issue the actions of this court and in particular its agents, the ARDC, have precipitated a series of constitutional issues, all of which have yet to be addressed and all of which have been conceded as having been raised.

These issues include whether or not the ARDC can usurp the power of the states attorneys and institute actions for the unauthorized practice of law on their own or whether the ARDC can recommend disciplinary actions without first going through the disciplinary procedures established in the Supreme Court Rules.

I would also point out that all of the actions by the ARDC and all the actions that bring us here today are based upon and emanating from the payment of a fee.

Mr. Greening has never been charged with improper conduct as an attorney.

The court's order for today characterizes Judge Bone's hearings as actions in the circuit court, but Bone determined at the very start of the hearings in an order that he signed that the action that he was undertaking was

not in the circuit court, that he was not sitting as a circuit court judge, and that he considered his actions as actions in the Supreme Court. He was acting as a surrogate for the Supreme Court in his mind.

Bone, in fact, considered his authority so limited that when he was presented with a motion by Greening at the close of the prosecution's case for a ruling on the sufficiency of that case before the defendant undertook the burden of going forward that he could not make that determination.

In fact, he specifically stated in the record that his own training and his own inclination would be to grant that motion but that he couldn't do it because his authority was so limited by the order of the court establishing the hearings in the first instance.

Greening was there for his right to defend without first the finding of the sufficiency that there was anything to defend against.

Greening never acted in a manner that was contumacious of this court. Taken in the background of this case and the issues that presented this case, the record supports the proposition that Greening attempted at all times in a way that was not contumacious of the court. All he wanted this court to do was to provide an objective and appropriate form to address his legal challenge, and in the context of trying to do that he tried in every manner to endeavor not to do anything that would be considered as bringing even the legal profession into disrepute or to be deemed in derogation of this court or the status of this court, but he did, of course, challenge strongly the issue that he originally raised.

In fact, in the federal court this court through its agents consistently state that Greening's rights would be protected and that his legal issues would be addressed.

As recent as last Friday the ARDC has told the U.S. Court of Appeals that all of Greening's issues have been addressed and that due process has been taken care of. But before Judge Bone the ARDC told the judge that the judge could only address questions of fact and that all questions of law must be directed and were to be directed by the Supreme Court.

Therefore, I ask directly, looking at this record and what has transpired, does this court believe it has now addressed all of the legal issues that Greening has raised?

We think not.

We are now poised to institute a sentencing in a proceeding in which serious questions of due process from a criminal trial are now present and in which the real pointed issue has yet to be addressed, and at no time has Mr. Greening again ever acted contumaciously toward this court, and without the finding of intent and without the direct finding of fact on the unauthorized practice of law it would seem that it would be inappropriate at this time to now sentence this individual for trying to raise a question.

If the court has any questions—otherwise I'm through.

THE COURT: Thank you very much.

MR. LARKIN: May it please the court, my name is Jerome Larkin. I represent the fee administrator in this proceeding. The administrator takes issue with the respondent's statement that the constitutional challenges he set forth in his answer to the rule to show cause at issue in the proceeding have not been addressed by this court.

In his order of May 29th, 1991 this court specifically indicated that it had considered the answer to a rule to show cause filed by the respondent and then it went on

to determine—and it is the court's determination by terms of the order—that had been established the respondent engaged in the unauthorized practice of law beyond a reasonable doubt.

Clearly the court by its order and prior to a determination of the unauthorized practice had concluded that the various challenges of the constitutional nature raised by respondent were without merit.

Similarly, the court had before it the factual findings made by Judge Bone in the entire record.

The administrator takes the position that the finding of the requisite mental state is part and parcel of this court's determination reflected in the order of May 29 of this year.

This, of course, is the indirect criminal contempt proceeding, and we're here for sentencing and the authorized sentence can be a find of up to $500 and a period of incarceration up to six month.

The facts do show a contempt for the court and the processes this court has established to regulate the legal profession.

As the conduct of the respondent offends the dignity of this court in one of its crucial rolls, the administrator believes it's the court itself that can best judge the appropriate sanction.

The administrator does suggest, however, that judgment be entered and that the sanction be a minimum of a $500 fine.

The facts established in this proceeding do reflect a conscious disregard for the processes of this court and a refusal by the respondent to register under Supreme Court Rule 756.

Under Rule 756 respondent is required to register and pay to the Commission annually a registration fee, yet steadfastly refuses to do this and has indicated his disdain for the court's processes by his refusal to do this even in light of the court's order of September 27th of 1989 affording him an opportunity to pay to the Commission the appropriate fee.

THE COURT: Well, speaking correctly, he's not required to register to pay a fee unless he wishes to maintain his license and continue to practice law. No one has to keep paying fees if they're not going to practice law.

MR. LARKIN: I think the rule in its first paragraph imposes a duty upon every lawyer admitted.

It does say that every lawyer admitted must pay.

THE COURT: Well, I would take issue with you.

MR. LARKIN: Well, I don't mean to quibble exactly what's material to the ultimate decision in this case.

In any event the rule has an automatic sanction in it.

If a lawyer does not register and pay, the lawyer is not authorized to practice law, and we get to the facts that forms some basis of the indirect criminal contempt proceedings at this juncture.

The respondent clearly engaged in the unauthorized practice of law following his removal from the roll on March 1st of 1989.

From that time until at least October 20th of 1989 he maintained an appearance in a probate case.

He represented the independent administrator in the Estate of William Halbert.

Helen Halbert had hired him prior to February 19th of 1988 to represent her in probating her deceased hus-

band's estate. She paid him a fee. She expected that he would do what was necessary to probate the case.

In initiating the proceedings the respondent himself described himself as her attorney.

The respondent after March 1 continued to practice law. He never withdrew his appearance in that case, and he on March 6th of 1989 obtained from the Internal Revenue Service a letter determining that no tax was due from the estate.

Sometime prior to October 20th of 1989 Helen Halbert began to request the respondent to close the estate. She, of course, was not a lawyer. She didn't know whether what was required to close the estate, but she knew that there could be no impediment to closing it in a practical sense. She was the sole heir. The estate was—the value was in excess of a million dollars. It was ready to be closed.

The reason for the delay became obvious. She acknowledges the respondent told her that he might have a problem in closing the estate.

Well, the problem was his refusal to register. And keep in mind that just a short period earlier he had ignored this court's opportunity afforded to him to register and to pay the Commission and be restored to the master roll.

In any event Mr. Greening went forward.

He prepared a final account, met with Helen Halbert, presented that final account, filed it and then presented it to Judge Friedman, the Circuit Court of Sangamon County, seeking that it be approved.

Now, Judge Friedman correctly determined that he could not allow Mr. Greening to obtain the approval, be-

cause that would be a further evidence of the practice of law and violate the Supreme Court Rule 756.

In any event after Judge Friedman disallowed the respondent further activity in the estate, he obtained separate counsel for Helen Halbert, and the estate was closed.

As of today's date, Mr. Greening still has not paid to the Commission a registration fee and still is not authorized to practice law in this state.

In determining the appropriate sentence the administrator suggests there are four aggravating factors:

The first is that respondent has demonstrated a conscious and a (unintelligible) disregard for the mandates expressed in Rule 756, register and pay annual fees.

The unauthorized practice of law continued for a period of seven months following removal on March 1st.

The estate was compromised because its closing was delayed by respondent's own personal problem, and, of course, respondent used his activities and his effort to get the estate closed to justify the fee he obtained from Helen Halbert.

There are other factors, of course, to consider.

Respondent, as long seen, will not register. He is not authorized to practice law and represents little threat actually for further unauthorized practice.

He has no prior discipline. He has been a good attorney four almost—for about 42 years, and the administrator suggests considering all of the facts before the court that the court impose judgment of contempt and at the minimum impose a fine of $500.

In light of the respondent's statement that he record is not clear that the court has rejected the various con-

stitutional challenges interposed by the respondent in his answer to the rule to show cause, the administrator suggests that the court in its judgment specifically reject those constitutional challenges.

That is the position of the administrator in this proceeding.

Thank you.

THE COURT: Any rebuttal?

MR. MALANY: I'll make some very quick points.

On the question of intent it appears that we have two levels of intent or two types of intent.

There is the intent to act contumacious to the court, which is the intent that is required in order to have indirect criminal contempt.

Then there is the intent that is sprinkled throughout the ARDC's brief, and that is the intent to practice law.

I maintain that it's the intent to be contumacious of this court that has to be found before there can be a criminal conviction on indirect criminal contempt that has not and has yet to be determined.

With regard to registration, Mr. Greening was registered. The registration was accepted, and that registration was succeeded as being accepted by the ARDC.

In effect, in a federal lawsuit which is currently going on, he never refused to register. There was a delay may be in the time he registered, but he had never refused to register.

On the issue of payment, when this case first started, M.R. 5916, there was a petition by the ARDC to hold Greening in contempt. Two days or three days later that petition was amended to have him suspended.

This court issued an order for him to show cause why he should not be suspended, which, by the way, has also never been acted on.

In the course of answering that charge—of that so-called charge Greening stated specifically that he could not afford not to practice law, therefore, tendered his payment to the court that he was then before in a controversy dealing with the payment.

The legal issues involving that have never been addressed.

With regard to the Halbert case the record clearly shows, first of all, that he had talked with Helen Halbert way before she had ever asked him to close the case back of January of '89, and told him that he may not be able to handle the case, depending on what happened with this controversy before the Supreme Court.

Later on, as the record also shows, Halbert said she needed to have the case closed, did not explain why. He had then informed her of the same thing, that he may have a difficulty because of the controversy.

He had already tendered check to this court.

He went to Judge Cavanagh, who was the Chief Justice of the circuit and to whom had been the recipient of a letter from the ARDC informing him that Greening, in basic words, was not allowed to practice law. Although artfully drafted, that was the import of the letter.

He asked Judge Cavanagh if he could practice before his court given the status of the case at this point.

Cavanagh said he could not practice before Cavanagh but that it was every judge's decision individually as to what else to do.

He therefore went a day ahead of time, as the record also shows that he made two appearances before Judge Friedman, to tell Judge Friedman that the problem was coming up and to give him the file on his case before the Supreme Court and the ARDC.

He then went back the next day to find the judge's answer to that question.

He never intended to practice law if it was decided that he could not do so or one of the judges felt that he couldn't given the ambiguities that existed at the time with regard to payment.

There is nothing in the record, contrary to what was heard here, that the Halbert case itself was compromised, that it was delayed, or that anything was improper or that that client was harmed.

I have nothing else, your Honors.

THE COURT: Thank you very much.

The court will take a very brief recess.

The parties and the attorneys have to remain in the courtroom while we will return shortly.

(A short recess was taken.)

THE COURT: The court has adopted the following order:

Respondent Alfred H. Greening, Jr. having been held in indirect criminal contempt of court on May 29, 1991 for engaging in the unauthorized practice of law after his name was removed from the master roll of attorneys on March 1st, 1989, respondent and the representative of the administrator having appeared for sentencing on this contempt on June 25, 1991, and the court being fully advised in the premises;

The court reiterates its finding that it has been established beyond a reasonable doubt that respondent engaged in the unauthorized practice of law after his name was removed from the master roll of attorneys.

Specifically, respondent performed the following acts after March 1st, 1989 in the Halbert Estate case, Sangamon County Number 89-P-97, which constitute a practice of law:

1. Advised the estate administrator of the proper procedures for closing an estate under the Probate Act of 1975;

2. Prepared a final accounting presumably as required by Section 24-1 of the Probate Act of 1975; and

3. After obtaining the signature of the estate administrator on the final accounting, presented it to Judge Friedman.

The court also finds that respondent's argument that removing his name from the master roll of attorneys pursuant to the provisions of Supreme Court Rule 756 constitutes a violation of his due process rights because he is in compliance with "AN ACT to revise the law in relation to attorneys and counselors" (Illinois Revised Statutes, 1989, Chapter 13, paragraph 1, et seq.) and because the procedures prescribed by the Act were not followed here is an argument without merit. It is well established that it is exclusively within the prerogative of the Supreme Court to determine who shall be permitted to practice law in Illinois. While the General assembly may adopt acts which relate to the practice of law "such statutes are merely in aid of, and do not supersede or detract from the power of the judicial department to control the practice of law." People ex rel. Chicago Bar Association vs. Goodman (1937), 366 Illinois 346, at page 349.

The court also has considered respondent's other constitutional challenges made throughout the course of these proceedings, and we find them to be without merit.

Therefore, respondent is sentenced as follows:

Respondent is fined in the amount of $200 to be paid to the Clerk of this Court on or before July 25, 1991.

The rule to show cause that issued to the respondent on August 7th, 1989 is discharged, having been superseded by the rule to show cause enforced on May 29th, 1991.

Madam Marshal, the Supreme Court stands in recess until tomorrow morning at 9:00 a.m..

(Which were all the proceedings had in this cause on this date.)

IN THE SUPREME COURT OF ILLINOIS

M.R. 5916

I, Jerry Wedeking, an Official Court Reporter and Certified Shorthand Reporter for the State of Illinois, do hereby certify that I transcribed the proceedings had on the hearing in the above-entitled cause from an audio tape; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the audio-taped proceedings had before the Supreme Court of Illinois on June 25, 1991 in said cause.

/s/ Jerry Wedeking
Official Court Reporter

Dated this 22nd day of July, 1991.

APPENDIX D

[Filed May 30, 1990]

M.R. 5916

IN THE
SUPREME COURT OF ILLINOIS

In re:	)	
	)	
Alfred H. Greening, Jr.,	)	Atty. Reg. & Disc. Comm. 89 CH 425
	)	
Respondent	)	
	)	

ORDER

The Administrator of the Attorney Registration and Disciplinary Commission having alleged in a verified supplemental report filed with the Court on February 13, 1990, that respondent Alfred H. Greening, Jr. has engaged in the unauthorized practice of law after his name was removed from the Master Roll of Attorneys on March 1, 1989, pursuant to Supreme Court Rule 756 for failing to register and pay the registration fee for the year 1989, and respondent having answered the rule to show cause that issued to him on March 26, 1990, directing him to show cause why he should not be held in indirect criminal contempt of Court for engaging in the unauthorized practice of law;

It is ordered that the rule to show cause is continued, and that respondent and the representative of the Attorney Registration and Disciplinary Commission appear before the Honorable J. David Bone, Judge of the Seventh Judicial Circuit, in Room D, Third Floor, of the Sangamon

County Courthouse at 9:30 A.M. on Thursday, June 21, 1990, for the purpose of an evidentiary hearing in which only findings of fact shall be made on the issues formed by the Administrator's verified report and the respondent's answer to the rule to show cause. The transcript of the proceedings before Judge Bone shall be filed with the Clerk of this Court.

Miller, J. took no part.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court this 30th day of May 1990.

/s/ JULEANN HORYNAK Clerk,
Supreme Court of the State of Illinois.

APPENDIX E

[Filed December 27, 1990]

M.R. 5916

IN THE
SUPREME COURT OF ILLINOIS

In re:	)	
	)	
Alfred H. Greening, Jr.,	)	Atty. Reg. & Disc. Comm. 89 CH 425
	)	
Respondent	)	
	)	

ORDER

The motion by respondent Alfred H. Greening, Jr. to vacate the briefing schedule of December 5, 1990, and to set a new schedule is allowed. The brief of the Administrator of the Attorney Registration and Disciplinary Commission on the issue of whether respondent engaged in the unauthorized practice of law after his name was removed from the Master Roll of Attorneys on March 1, 1989, is due on or before January 31, 1991, and the brief of respondent is due on or before March 7, 1991.

Moran, C.J. and Miller, J. took no part.

APPENDIX F

[Filed May 29, 1991]

IN THE SUPREME COURT OF ILLINOIS

M.R. 5916

In re:	)	
	)	Atty. Reg.
Alfred H. Greening, Jr.,	)	& Disc. Comm.
	)	89 CH 425
Respondent	)	
	)	

ORDER

This cause having come for consideration on this Court's rule to show cause, the factual findings made by the Circuit Court of the Seventh Judicial Circuit on the issues formed by the verified supplemental report filed by the Administrator of the Attorney Registration and Disciplinary Commission and the answer to the rule to show cause filed by respondent Alfred H. Greening, Jr., and on the briefs filed by the parties, and this Court being fully advised in the premises;

It is the determination of this Court that it has been established beyond a reasonable doubt that respondent engaged in the unauthorized practice of law after his name was removed from the Master Roll of Attorneys on March 1, 1989. The rule to show cause that issued to respondent on March 26, 1990, is enforced, and respondent is held in indirect criminal contempt of Court for engaging in the unauthorized practice of law. Respondent and the representative of the Administrator are directed to appear for sentencing on this contempt on Tuesday, June

25, 1991, at 3:00 P.M. in Springfield. Arguments will be limited to ten minutes for respondent, ten minutes for the Administrator, and five minutes for respondent's rebuttal.

Miller, C.J. and Moran, J. took no part.

APPENDIX G

[Filed June 25, 1991]

IN THE SUPREME COURT OF ILLINOIS

M.R. 5916

In re:	)	
	)	Atty. Reg.
Alfred H. Greening, Jr.,	)	& Disc. Comm.
	)	89 CH 425
Respondent	)	
	)	

ORDER

Respondent Alfred H. Greening, Jr. having been held in indirect criminal contempt of Court on May 29, 1991, for engaging in the unauthorized practice of law after his name was removed from the Master Roll of Attorneys on March 1, 1989, respondent and the representative of the Administrator having appeared for sentencing on this contempt on June 25, 1991, and the Court being fully advised in the premises;

The Court reiterates its finding that it has been established beyond a reasonable doubt that respondent engaged in the unauthorized practice of law after his name was removed from the Master Roll of Attorneys; specifically, respondent performed the following acts after March 1, 1989, in the Halbert Estate case (Sangamon County No. 88 P 97) which constitute the practice of law:

1. Advised the estate administrator of the proper procedures for closing an estate under the Probate Act of 1975 (Ill. Rev. Stat. 1989, ch. 110½, par. 1-1 *et seq.*);

2. Prepared a final accounting presumably as required by Section 24-1 of the Probate Act of 1975 (Ill. Rev. Stat. 1989, ch. 110½, par. 24-1); and

3. After obtaining the signature of the estate administrator on the final accounting, presented it to Judge Friedman.

The Court also finds that respondent's argument that removing his name from the Master Roll of Attorneys pursuant to the provisions of Supreme Court Rule 756 constitutes a violation of his due process rights because he is in compliance with "AN ACT to revise the law in relation to attorneys and counselors" (Ill. Rev. Stat. 1989, ch. 13, par. 1 *et seq.*) and because the procedures prescribed by the Act were not followed here is an argument without merit. It is well established that it is exclusively within the prerogative of the Supreme Court to determine who shall be permitted to practice law in Illinois. While the General Assembly may adopt acts which relate to the practice of law "[s]uch statutes are merely in aid of, and do not supersede or detract from, the power of the judicial department to control the practice of law." *People ex rel. Chicago Bar Association v. Goodman* (1937), 366 Ill. 346, 349.

The Court also has considered respondent's other constitutional challenges made throughout the course of these proceedings, and we find them to be without merit.

THEREFORE respondent is sentenced as follows:

Respondent is fined in the amount of two hundred dollars ($200), to be paid to the Clerk of this Court on or before July 25, 1991.

The rule to show cause that issued to respondent on August 7, 1989, is discharged, having been superceded by the rule to show cause enforced on May 29, 1991.

Miller, C.J., and Moran, J. took no part.

APPENDIX H

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 27, 1991

Before
Hon. Frank H. Easterbrook, Circuit Judge
Hon.
Hon.

Alfred H. Greening, Jr.,

Plaintiff-Appellant,

No. 90-3784

v.

Thomas J. Moran, Honorable, individually, and as Chief Justice of the Supreme Court of Illinois, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 90 C 3071—Richard Mills, Judge.

This matter comes before this Court for its consideration of the "MOTION TO TAKE JUDICIAL NOTICE AND SUPPLEMENT THE RECORD" filed September 25, 1991, by counsel for appellant. On consideration thereof,

IT IS ORDERED that this motion is DENIED.

APPENDIX I

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 31, 1991

Before
Hon. JOHN L. COFFEY, Circuit Judge
Hon.
Hon.

Alfred H. Greening, Jr.,
Plaintiff-Appellant,

No. 90-3784 v.

Thomas J. Moran, Honorable, individually, and as Chief Justice of the Supreme Court of Illinois, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 90 C 3071—Richard Mills, Judge.

ORDER

This matter comes before the court for its consideration of the "MOTION TO SUPPLEMENT RECORD AND TAKE JUDICIAL NOTICE" filed herein on July 25, 1991, by counsel for the Attorney Registration and Disciplinary Commission. On consideration thereof,

IT IS ORDERED that the motion is GRANTED and the court will take judicial notice of the orders of the Illinois Supreme Court dated June 25, 1991 and July 22, 1991, in the matter captioned *In Re: Alfred H. Greening, Jr.* The clerk of this court will distribute copies of these orders to the merits panel with the briefs.